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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 598

THE STATE OF NEW YORK,
Petitioner,

against

JOSEPH CARDINAL, doing business under the name and style of CARDINAL ENGINEERING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE HIGHEST COURT OF NEW YORK STATE

NATHANIEL L. GOLDSTEIN
Attorney General of the State
of New York
Attorney for Petitioner

WENDELL P. BROWN
Solicitor General

HENRY S. MANLEY
Assistant Attorney General

Of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of New York, by its undersigned Attorney General, prays for a writ of certiorari to review a decision of the Court of Appeals of the State of New York, being the court of last resort of that State. The decision is officially reported as *Cardinal* v. *State*, 304 N. Y. 400. The decision is final in nature, as appears by the remittitur of the Court of Appeals and its subsequent orders and the proceedings of the Court of Claims of the State of New York obedient to them. The ultimate effect of the decision and remittitur and orders of the Court of Appeals was to cause the Court of Claims to enter judgment on December

22, 1952, in favor of Cardinal and against the State for liability of $87,000, in addition to affirming a liability of $14,000 previously adjudged against the State by an Appellate Division, plus certain costs and interest.

The State respectfully represents that the Court of Appeals decided substantial Federal questions in a way probably not in accord with the applicable decisions of this Court, and denied to the State a right or immunity specially set up and claimed under a statute of the United States.

Statement of Matter Involved

The State's liability was asserted and determined because it had issued, through its State Insurance Fund, a policy of insurance and an endorsement thereof covering certain liabilities relative to the Workmen's Compensation Law and the Longshoremen's and Harbor Workers' Compensation Act.* Paragraph One (a) of the policy and endorsement covered the liabilities of Cardinal to his employees and their representatives for their injuries, as imposed by the Law and Act respectively. Paragraph One (b) covered other liabilities imposed by law upon the employer because of such injuries to his employees. That is, it covered what are commonly called "third party liabilities". It expressly excluded liabilities which the employer assumed by contract with third parties.

On January 3, 1945, while those policy and endorsement provisions were in force, there was an accident on the steamship "Hilton". It was a maritime accident on navigable waters while the ship was moored at a New York

* The relevant provisions of the statutes are Appendix A to this petition and the relevant provisions of the policy and endorsement are Appendix B.

pier for repairs. Cardinal was making the repairs under contract with the United States which owned the "Hilton". A number of Cardinal's employees were injured and one was killed.*

The injured employees and the representative of the deceased employee were paid the appropriate compensation and medical benefits under the Longshoremen's and Harbor Workers' Compensation Act. The Act provides that such liability is "exclusive" (33 U. S. C. § 905). But it had been held that a similar provision of the N. Y. Workmen's Compensation Law (§ 11) did not protect an employer from indemnifying a third party who had been held liable to his employees, provided the employer's negligence was "active" and the third party's negligence was merely "passive". *Westchester Lighting Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175 (1938). Libels were brought on behalf of the injured employees against the United States. It cross-petitioned against Cardinal, alleging two causes of action, the first based on his alleged negligence and the second based on his contract with the United States. Cardinal's answer to the libels and cross-petition alleged that his employees had received their payments under the Act and pleaded that as a bar to any further liability by him.*

The State refused to defend Cardinal. The United States settled with the injured employees for $145,000 and Cardinal paid sixty percent of that amount or $87,000. He also

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* The facts of the accident and injuries appear from the majority opinion of the Court of Appeals (304 N. Y. at p. 406) also the opinions of the lower courts (R. 3, 9-10 and 139) and the testimony (R. 58-66).

* The pleadings in the admiralty proceedings are Cl. Ex. 31 herein (R. 93). See also the majority opinion of the Court of Appeals (304 N. Y. at pp. 406-407) and the opinions of the lower courts (R. 12, 136-137, 140).

expended $14,000 for legal services relative to his defense and settlement.

Under the practice of the Court of Claims the State does not plead its defenses, it briefs them after trial of the facts. In the present suit the State has at various times relied on other defenses, but constantly it has relied on the immunity under 33 U. S. C. § 905, to the effect that Cardinal's liability under the Act was "exclusive" of any liability to third parties for Cardinal's negligence to his employees. The State's position has been constantly that the liability to the United States which Cardinal settled must have arisen under their contract, because there was no other liability. Such liability does not arise between joint tortfeasors in admiralty in a non-collision case whether the negligences are active or passive, and moreover such liability is forbidden by 33 U. S. C. § 905 when applied to the facts of the present case.

The Court of Claims held that in admiralty there was a right of contribution between joint tortfeasors, but not under the circumstances of the present case (R. 24-25). For that distinction it relied upon *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 (2d Cir. 1950).

The State had cited that and various other Circuit Court of Appeals citations to show that for present purposes the *Westchester* decision was not to be followed. Its argument is illustrated by the following paragraph from pages 5-6 of the State's brief before the Appellate Division:

> "The reason the obligation does not arise under admiralty law upon the facts of the present case is shown in *American Mutual Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 (2d Cir., 1950), and related cases." [Footnote citations omitted for present purposes.] "The Federal courts, for admiralty law and under provisions of the Longshoremen's and Harbor

> Workers' Compensation Act, have reached a result diametrically opposed to the result our Court of Appeals reached under our Workmen's Compensation Law in the case of *Westchester Lighting Co.* v. *Westchester C. S. E. Corp.*, 278 N. Y. 175 (1938). The language, that the statutory remedy of employees shall be 'exclusive and in place of any other liability whatsoever', found in both statutes, has been held by the Federal courts to mean that employees cannot place an additional liability on employers by indirection. That is, employees can recover against a third party, but he cannot demand that their employer do more than pay the compensation and medical benefits according to the statutory schedule."

The Appellate Division agreed with the Court of Claims upon the matter previously summarized (R. 142). Both courts held that under Federal law there was no liability of Cardinal to the United States which supported the $87,000 settlement other than a contractual liability and hence Cardinal was not entitled to recover that sum from the State.

A majority of the Court of Appeals has held, notwithstanding 33 U. S. C. § 905 and *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (Jan. 1952), that Cardinal is entitled to recover its $87,000 settlement from the State. See its discussion of the *Halcyon* case at 304 N. Y. pages 413 and 416-418, particularly its conclusion at the top of page 418 that:

> "Seemingly, the maritime courts, despite the *Halcyon* and *Matthews* cases *(supra)*, still follow our *Westchester Lighting Co.* case * * *."

The reasons upon which the State supports its representation that the Court of Appeals decided substantial Federal questions inconsistently with the applicable decisions of this Court, and denied to the State a right or immunity

specially set up and claimed under a statute of the United States, will be presented in subsequent pages of this petition.

Basis of Jurisdiction.

Authority for the proposed review is of course to be found in 28 U. S. C. § 1257 subd. 3, to the effect that a final judgment or decree of the highest court of the State may be reviewed by writ of certiorari,

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The statute of the United States under which the State claims a right or immunity is § 905 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 905) which is quoted in an appendix to this petition. It provides that the liability of an employer, and hence of his insurer, shall be,

> "exclusive and in place of all other liability of such employer to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

The timing of this application presents a jurisdictional problem. The Court of Appeals announced its decision on July 15, 1952, and the present application will not be filed until February 1953. The time within which such an application can be made is of course limited by 28 U. S. C. § 2101 subd. (c), and must be "within ninety days after the entry of such judgment or decree", except that, "a justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days". On January 19, 1953, Mr. Justice Jackson signed an order as follows:

> "It is Ordered that the time for filing petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including March 9th, 1953, provided the time has not already expired."

The certification of the record herein, excepting the opinions of the Court of Appeals which are certified by its Chief Judge and Clerk and the Official Reporter, is by the Clerk of the Court of Claims. As appears from his certification the original record came to him from the Court of Appeals accompanied by its remittitur, by which the case was remitted to the Court of Claims,

> "for entry of judgment in favor of the claimant as demanded in the claim, with costs in all courts."

The judgment in favor of Cardinal and against the State was not entered until December 22, 1952, according to the same certification. The reasons for the delay are suggested by recitals in the judgment, and also by orders of the Court of Appeals on October 9, 1952, and December 5, 1952, which are certified by its Clerk and presented as parts of the record. See also the official reports of those orders, at 304 N. Y. 732 mem. and 875 mem. respectively.

It thus appears that at some time after the decision of July 15, 1952, the State duly made application for reargument in the Court of Appeals, which application was entertained by that Court and denied on October 9, 1952. The extension of time to March 9, 1953, under the order of Mr. Justice Jackson, confers a total of 150 days after October 9, 1952.

After the denial of reargument and before entry of judgment in the Court of Claims an application to the Court of Appeals was made by Cardinal for amendment of the remittitur. This application was entertained by the Court and was denied on December 5, 1952. The problem pre-

sented was whether the judgment to be entered in the Court of Claims in favor of Cardinal and against the State should include about five years interest on the recovery of $101,000. The decision of the Court of Appeals was that "the question of interest in this cause is, in the first instance, for the Court of Claims to pass upon". As appears from a recital in the judgment entered December 22, 1952, an order for such interest preceded entry of the judgment.

The judgment of December 22, 1952, was the first entry in any court of the indebtedness asserted in favor of Cardinal and against the State for the sum of $87,000 and interest having sufficient formality and precision and force to authorize its payment by the State. It was the first and only judgment for the principal sum in litigation which would support process for its collection against a defendant other than the State. It was the first and only judgment for that sum from which an appeal might have been taken consistently with the practice of the State courts.

Early in January 1953 the State, intent on the present application, became aware of the possible significance for present purposes of *Dept. of Banking* v. *Pink*, 317 U. S. 264, and *Cole* v. *Violette*, 319 U. S. 581. Those decisions make it clear that if there had been before July 15, 1952, a formal judgment in favor of Cardinal and against the State for the sum of $87,000 and interest, which is principally at issue herein, and if that judgment was merely affirmed by the Court of Appeals, application for certiorari immediately after the decision of affirmance would not have been premature. The limited period would in such case run from the decision, subject however to extension pending the application for reargument and perhaps pending Cardinal's motion to amend the remittitur.

It is respectfully submitted that the present case is materially different from the cases to which the two citations

applied, and that the practice announced in those decisions should not be extended to the present facts. Moreover, if the practice does extend to the present facts, the State submits that the power of the Court to extend the time for this application should be exercised to its fullest extent and is not exceeded by the order of January 19, 1953.

Questions Presented

1. Was the decision of the Court of Appeals, holding that Cardinal was liable to the United States otherwise than by their contract, for injuries sustained by Cardinal's employees in a maritime accident which was not a collision, consistent with the decision of this Court in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, and any other applicable decision?

2. Did such decision of the Court of Appeals deprive the State of a right or immunity which it claimed under the Constitution or any statute of the United States, and particularly under 33 U. S. C. § 905?

Reasons for Writ

The dissenting opinions in the Court of Appeals, which are reported in 304 N. Y. pages 419-424, support the State's suggestion that the majority of the Court erred upon important Federal questions. The State adopts as its entire brief and argument for present purposes the following paragraphs from the dissenting opinion of Judge Dye, together with the summary of the same ground in the shorter dissenting opinion of Judge Fuld:

> "The dispute turns on whether, under the circumstances of this case, Cardinal as impleaded defendant was under an obligation 'imposed by law' to contribute to his joint tort-feasor; for if he was, then the coverage of the policy was available to him and the Fund

should have reimbursed him for his contribution to the settlement and accepted defenses of the interpleading petition. Everyone agrees that unless there is a liability 'imposed by law', he may not recover for the indemnity obligation assumed by contract is specifically excluded. When the accident giving rise to the claims occurred on January 3, 1945, it is claimed that the admiralty law was not clear as to whether contribution between joint tort-feasors in noncollision cases was governed by the moiety rule *(The North Star,* 106 U. S. 17; *The Chattahoochee,* 173 U. S. 540; *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394) or the common-law rule *(Chapman* v. *Forbes,* 123 N. Y. 532). The Federal courts have held, however, that when the third party is an employer covered by the Longshoremen's and Harbor Workers' Compensation Act (U. S. Code, tit. 33, § 933) the liability of the employer is not the kind of wrongdoing that will be regarded as creating a common responsibility, for the act has provided an absolute duty to pay the prescribed compensation *(The Ira M. Hedges,* 218 U. S. 264). The Longshoremen's Act is also a valid defense to an asserted right of contribution *(American Mut. Liability Ins. Co.* v. *Matthews,* 182 F. 2d 322 [C. A. 2d]; see also *Rich* v. *United States,* 177 F. 2d 688 [C. A. 2d]).

"The Fund took the position throughout, and was sustained in the courts below, that Cardinal had no liability imposed by law within the coverage of the policy. While the case was being litigated, albeit subsequent to the date of the accident giving rise to it, the United States Supreme Court settled any doubt as to contribution between joint tort-feasors in noncollision cases by holding that the common-law rule of noncontribution between joint tort-feasors is applicable *(Halcyon Lines* v. *Haenn Ship Corp.,* 342 U. S. 282). We are bound by the rule of that decision. Our practice is well settled that we take the law as we find it at the time of the appeal, whether statutory *(Matter of Kahn* [*National City Bank*], 284 N. Y. 515; *Robinson* v. *Robins Dry Dock & Repair Co.,* 238 N. Y. 271; *Matter of Tartaglia* v. *McLaughlin,* 297 N. Y. 419; *Gilpin* v. *Mutual Life Ins. Co. of N. Y.,* 299 N. Y. 253), or decisional *(Graybar Elec. Co.* v. *New Amsterdam*

Cas. Co., 292 N. Y. 246). The case of *McFall* v. *Compagnie Maritime Belge* (304 N. Y. 314), handed down herewith, suggests no different result for there we dealt with the rights of a passively negligent owner and active wrongdoers, while our present case arose out of a joint wrong by active tort-feasors, a difference which points the distinction."

The petitioner prays and respectfully submits that this Court grant certiorari herein.

February 5, 1953.

NATHANIEL L. GOLDSTEIN
Attorney General of the State
of New York
Attorney for the Petitioner

WENDELL P. BROWN
Solicitor General

HENRY S. MANLEY
Assistant Attorney General
Of Counsel

Appendix A

N. Y. Workmen's Compensaton Law § 10:

"Every employer subject to this chapter shall * * * secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury * * *" (Originally enacted by L. 1914 c. 41, substantially as above, which follows the wording as amended.)

N. Y. Workmen's Compensation Law § 11:

"The liability of an employee prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death * * *" (Originally enacted by L. 1914 c. 41, substantially as above, which follows the wording as amended.)

Historical relationship between N. Y. Workmen's Compensation Law and Longshoremen's and Harbor Workers' Act.

On August 15, 1914, an employee named Jensen was killed while unloading a steamship at a New York pier. An award was made under the State law and upheld by the Court of Appeals, but it was reversed by the Supreme Court of the United States. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), four justices dissenting. It was held that the State law as applied was unconstitutional because of the "exclusive jurisdiction" of the Federal courts in maritime matters and the inconsistency between the State law and certain Federal acts. See also, *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920).

An Act of Congress in 1922 which attempted to give the States power to impose liability in such cases under their compensation laws was held invalid. *Washington* v. *Dawson,* 264 U. S. 219 (1924).

Thereupon, in 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424), and the New York Legislature authorized the State Insurance Fund to insure obligations under the Act (L. 1928 c. 750).

Longshoremen's and H. W. C. Act § 904:

"Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this chapter. * * * Compensation shall be payable irrespective of fault as a cause for the injury."

Longshoremen's and H. W. C. Act § 905:

"The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *"

Appendix B

Excerpt from Claimant's Exhibit 1, the Policy issued by State Insurance Fund to Cardinal:

"One (a): Against all liability under Chapter 41 of the Laws of 1914, State of New York, known and cited as the Workmen's Compensation Law, as amended and revised by Chapter 615 of the Laws of 1922, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force, in respect of operations described in the declaration attached to this policy together with operations incident thereto while conducted either at the work places herein described and defined or elsewhere in connection therewith, and

"One (b): Agrees to indemnify this employer against loss by reason of any liability imposed upon him by law for damages on account of such injuries to such employees wherever such injuries may be sustained. These obligations are limited to the liability imposed by law upon the employer for negligence but specifically exclude any liability on account of occupational disease as well as any liability assumed by the employer under any contract entered into with any other person, association or organization."

Excerpt from State's Exhibit B, an Endorsement of September 7, 1944, to the Policy:

"The obligations of the Policy to which this endorsement is attached, include the Longshoremen's and Harbor Workers' Act, being Public Act No. 803 of the 69th Congress, approved March 4, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

"The State Insurance Fund's liability under Paragraph One (b) of the Policy to which this endorsement is attached shall be limited to $25,000, as respects injuries or death sustained by one or more persons as a result of any one accident. This endorsement is applicable with respect to any accident sustained on navigable waters by persons whose work comes within the scope of any classification for which the Policy provides coverage under the United States Longshoremen's and Harbor Workers' Compensation Act."

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

DANIEL MCNAMARA,
Attorney for Respondent.

THOMAS A. MCDONALD,
Of Counsel.

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Statement of Matters Involved

The suit was brought by claimant on a policy of insurance issued by the State Insurance Fund. The Court of Appeals has held that the policy covered among others the following obligations:

> "* * * to indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such employees wherever such injuries may be sustained including the liability imposed upon this employer by reason of a suit or claim brought against him by another to recover

the amount of damages obtained from such other by an employee of the employer for injuries sustained by such employee arising out of and in the course of his employment" (R. 161).

* * * * * *

"THE STATE INSURANCE FUND WILL DEFEND in the name of and on behalf of this employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent, * * *" (R. 151).

Substantially the Court of Appeals held as follows:

1. The suit is on an insurance policy issued by the State Insurance Fund (R. 151).
2. The policy contained an agreement by the Fund to defend in the name of the insured any action brought against him by his employees or by a third party seeking to impose liability on the employer for the amount of damages obtained from such other (R. 151).
3. Libels were filed by Cardinal's employees against the United States claiming damages for such injuries and the United States filed petitions impleading Cardinal (R. 152, 153).
4. The petitions required Cardinal to answer the allegations of the libels as well as the petitions (R. 153).
5. The State Insurance Fund breached its contract by unjustifiabily refusing to defend the actions (R. 154, 156).

6. Cardinal, thus forced to defend himself, acted reasonably in settling the actions for the sum of $87,000. and reasonably expended $14,000. to counsel for the defense of the actions (R. 156, 157, 165).

Objections to Jurisdiction

(a) This Court is without jurisdiction to review a "decision" of the Court of Appeals of the State of New York.

The document filed by petitioner is entitled: "PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE HIGHEST COURT OF NEW YORK STATE." It "prays for a writ of certiorari to review a decision of the Court of Appeals of the State of New York, being the court of last resort of that State." It further states: "The decision is officially reported as Cardinal v. State, 304 N. Y. 400."

It specifically bases its claim to jurisdiction on 28 U. S. C., Section 1257, subd. #3. Section 1257 reads in part:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"

While under Title 28 U. S. C., Secs. 1254 and 1255, "cases" in the United States Court of Appeals or Court of Claims may be reviewed, even on certified questions, only final judgments or decrees of state courts may be reviewed.

The deliberate use of the word "decision" by petitioner rather than the "judgment" or "remittitur" of the Court of Appeals, which was entered on the same date as the decision, that is, July 15, 1952 is a patent attempt to confuse the issue on the question of the timeliness of the petition which will be discussed immediately below. If the petitioner concedes that the "judgment" which it seeks

to review was entered on July 15, 1952, the petition obviously was not timely filed. If on the other hand it seeks to review as the "judgment" of the Court of Appeals, the judgment entered in the Court of Claims on December 22, 1952, upon the directions of the Court of Appeals it must face a number of decisions of this Court, which will be later discussed, holding that such judgment entered in the lower Court is not reviewable by this Court.

(b) The petition was not filed within the time prescribed by statute.

Petitioner states that the time within which the application must be made is governed by Title 28 U. S. C., Sec. 2101, subd. (c). That subsection reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The petition herein was filed on February 11, 1953.

There are four dates which petitioner raises as being pertinent.

On July 15, 1952 the decision of the Court of Appeals was handed down and the remittitur or judgment of the Court of Appeals was entered (R. 172). Ninety days would expire on October 13, 1952. The State's motion for reargument was denied on October 9, 1952 (R. 173). Ninety days from that date would expire on January 7, 1953. Obviously if either of these two dates is the proper date the time for filing the petition has not only expired

but it had expired on January 19, 1953 when Mr. Justice Jackson signed an order extending the time to March 9th, 1953 "provided the time had not already expired" (R. 178). It is equally obvious that if the time had expired on January 7, 1952, Mr. Justice Jackson could not extend the time to March 9, 1953, which would be more than the sixty days allowed by Sec. 2101, Title 28, subd. (c).

The next date suggested is December 5, 1952, the date when Cardinal's motion for an amendment of the remittitur was denied (R. 173).

A motion to amend the remittitur does not toll the statute.

Department of Banking v. *Pink*, 317 U. S. 264.

The petitioner strongly urges that December 22, 1952, the date when the judgment was entered in the Court of Claims is the date from which the ninety days is to be figured (R. 176). It recognizes the fact that in *Dept. of Banking* v. *Pink*, 317 U. S. 264, and *Cole* v. *Violette*, 319 U. S. 581, this Court has definitely ruled that the time starts to run from the time of the rendition of the judgment of the Court of Appeals. Petitioner's counsel tries to distinguish those two cases by suggestion that a different rule should apply when the Court of Appeals affirms an already existing judgment than when the Court of Appeals directs a judgment for the first time.

This distinction is untenable. In *Dept. of Banking* v. *Pink* (*supra*), 317 U. S. 264, 267, this Court said in part:

> "See especially Chief Justice White's opinion in Mower v. Fletcher, 114 U. S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had

> directed. See also Wurts v. Hoagland, 105 U. S. 701, 702, and Clark v. Williard, 292 U. S. 112, 117, 118. This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of Sec. 237 of the Judicial Code, a final judgment reviewable here."

In *Mower* v. *Fletcher,* 114 U. S. 127, the Appellate Court of the State of California had rendered a judgment directing that the judgment of the state district court

> "be, and the same is hereby, reversed, with costs, with directions to the superior court of Los Angeles county to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

In the instant case the remittitur directed that

> "the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified in accordance with the opinion herein, judgment of the Court of Claims reversed, and the case remitted to the Court of Claims for entry of judgment in favor of the claimant as demanded in the claim, with costs in all courts" (p. 172).

If, in fact, the remittitur of the Court of Appeals did not fully determine all of the rights of the parties in this matter, then this petition must in any event be denied because the judgment entered in the Court of Claims was not a judgment of the Court of Appeals and therefore was not a judgment "rendered by the highest court of a State in which a decision could be had", as required by Title 28, Sec. 1257. *Bruce et al.* v. *Tobin,* 245 U. S. 18.

If the judgment of the Court of Appeals did not finally determine all of the rights of the parties the State would be compelled first to appeal the judgment of the Court of Claims to the Appellate Division of the Supreme Court and from there back again to the Court of Appeals before application could be made to this court for review. In either event therefore, this petition must be denied because the only judgment of the highest court of the state in existence today is the judgment entered July 15, 1952.

(c) No Federal statutes are involved in this litigation.

Petitioner claims that Title 28 U. S. C. Sec. 1257, subd. 3, justifies the granting of a writ of certiorari in this case based upon the following language:

> "* * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It then asserts in general language that a right or immunity claimed under Sec. 905 of the Longshoremen's and Harbor Workers' Compensation Act. (33 U. S. C., Sec. 905) was denied to it. But specifically it does not contend that that section granted any rights to the petitioner; on the contrary, its contention as to the application of that section is in substance given in the following quotation from the petition, page 4:

> "In the present suit the State has at various times relied on other defenses, but constantly it has relied on the immunity under 33 U. S. C. Sec. 905, to the effect that Cardinal's liability under the Act was 'exclusive' of any liability to third parties for Cardinal's negligence to his employees."

In other words, it contends that Cardinal had rights under that section which he did not fully assert and defend in the actions brought against him.

That section certainly has no application to the rights between an insurer and insured under a policy of insurance, especially when the insurer in violation of the duties assumed by its contract unjustifiably refuses to defend actions brought against its insured. This is made patent by the following quotation from the opinion of the Court of Appeals:

> "We come now to the State's argument based on *Halcyon* v. *Haenn, supra,* decided by the nation's highest court after the present suit had been passed on by the Appellate Division. Of course, *Halcyon* v. *Haenn* would be the present law of a hypothetical case which would be up for decision now, had the United States paid the whole settlement, and were it now suing Cardinal for contribution. But there is no such suit, and no such situation. Our problem is as to the rights, between themselves, of Cardinal and the State Insurance Fund, as of 1946 and 1947, when the Fund breached its obligation to defend Cardinal, and waived all questions except as to the $25,000 alleged limit. The Fund, had it so chosen, could have taken on the defense of the impleading petitions, with such reservations of rights as against Cardinal, as it thought appropriate. The Fund, we suppose, could have defended against the tort count in the impleading petitions, and required Cardinal to defend himself as to any contract claim by the United States, if the Fund thought that there was any difference between the 'tort' liability and the 'contract' obligation. It did none of these things. It waived all claims of noncoverage except one now shown to be invalid, and, while conceding the fairness of the settlements, refused to defend, or to join in the settlements. By so doing, it, as matter of law, breached its insurance contract and, on the concessions here, the damages for that breach could be in no sum other than the total of the settlement amount plus the lawyer's fees paid by Cardinal" (R. 163).

(d) The only "questions presented" by the petition do not in fact exist.

The petition (p. 9) states the "questions presented" as follows:

> "1. Was the decision of the Court of Appeals, holdthat Cardinal was liable to the United States otherwise than by their contract, for injuries sustained by Cardinal's employees in a maritime accident which was not a collision, consistent with the decision of this Court in Halcyon Lines v. Haenn Ship. Corp., 342 U. S. 282, and any other applicable decision?
>
> 2. Did such decision of the Court of Appeals deprive the State of a right or immunity which it claimed under the Constitution or any statute of the United States, and particularly under 33 U. S. C. Sec. 905?

Both of these questions are founded upon the assertion that the Court of Appeals held "that Cardinal was liable to the United States otherwise than by their contract, for injuries sustained by Cardinal's employees * * *."

This fundamental assertion, embodied in both questions and without which there are no questions, is untrue.

Rules 38, 26 and 27 of this Court make it very plain that any assertion of error by the State Court should be supported by reference to the portion of the record which supports the assertion. The majority opinion of the Court of Appeals consisted of seventeen pages. No place in that opinion will the assertion of petitioner be supported; on the contrary, the entire opinion negatives that assertion.

The judgment is based entirely upon an interpretation of the statutory policy of insurance issued by the State Insurance Fund.

The opinion is summarized by the Court of Appeals as follows:

> "Summing up, we think that the breach by the Fund, of its policy contract, and the reasonableness of the subsequent settlement made by Cardinal, were established beyond any dispute, and accordingly, that there was no defense to this suit and that there is now no necessity for a new trial" (R. 165).

Petitioner adopts as its entire brief and argument a quotation from the dissenting opinion of Judge Fuld quoted at pages 9 and 10 of the petition. That quotation starts as follows:

> "The dispute turns on whether, under the circumstances of this case, Cardinal as impleaded defendant was under an obligation 'imposed by law' to contribute to his joint tort-feasor: * * *."

The majority opinion said in part:

> "The argument from the *Halcyon* case (*supra*), is that, since Cardinal and the United States have, in the present suit, by findings of fact, been held to be joint feasors, thus, it is said, there never was any right in the United States to exact contribution from its joint tort feasor Cardinal. Of course, that is all 'after the event' material, since when the settlements were made, there not only was no *Halcyon* case, but there was no finding, and no certainty that there ever would be a finding, that the United States and Cardinal were joint tort feasors" (R. 163-164).
>
> * * * * * *
>
> "Had the Fund wished to claim that, under the *Halcyon* or some similar theory, no tort liability ran against Cardinal, it should have undertaken the defense for that purpose" (R. 164).
>
> * * * * * *

> "On the clear showing of an unlawful refusal by this insurer to defend, the sole question is as to the reasonableness of the settlement thereafter made by the insured. That question must be answered *nunc pro tunc,* not by a long later trial, under newly handed down decisions, as to who could be held for damages, and on what theory, for the injuries to Cardinal's workmen" (R. 165).

It is thus patent that the Court of Appeals assumed petitioner's contention as to the holding of this Court in *Halcyon Lines* v. *Haenn Ship. Corp.,* 342 U. S. 282, was correct and made no finding contrary to that interpretation. On the contrary it held that, assuming the State's interpretation of that case to be correct, the state law required the imposition of liability because there had been an unlawful breach of its policy by the State Insurance Fund, and Cardinal acted reasonably in settling the claims against him amounting to $555,000 by the payment of $87,000 (R. 158, 165).

It is thus patent that the judgment of the Court of Appeals was based purely on state law and no decisions of Federal questions were involved. In such circumstances this Court has repeatedly held that it will not review judgments of State Courts resting on adequate state grounds.

> *Williams* v. *Kaiser,* 323 U. S. 471, 477;
> *Honeyman* v. *Hanan,* 300 U. S. 14, 18;
> *Lynch* v. *New York,* 293 U. S. 52.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

DANIEL MCNAMARA,
Attorney for Respondent.

THOMAS A. MCDONALD,
Of Counsel.

FILED
MAR 9 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 598

THE STATE OF NEW YORK,
Petitioner,

against

JOSEPH CARDINAL, doing business under the name and style of CARDINAL ENGINEERING COMPANY,
Respondent.

REPLY BRIEF, SUPPORTING PETITION FOR CERTIORARI

NATHANIEL L. GOLDSTEIN
Attorney General of the State
of New York
Attorney for Petitioner

WENDELL P. BROWN
Solicitor General

HENRY S. MANLEY
Assistant Attorney General

Of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

REPLY BRIEF

The Respondent's Brief, received on February 27 by mail, advances four reasons against the application for certiorari. A brief reply will be made to each of them.

A

The State did not intend that its terminology be confusing. Upon its Petition as a whole it should be clear that it seeks to review a "final judgment" rendered by the Court of Appeals of New York State.

B

The issue of the timeliness of the State's application depends upon understanding the chronology of a series of judicial acts. The State has no wish that they be confused by the labels used for them. In its Petition it used the terminology customarily used by a New York practitioner but if the facts are made clear the terminology does not matter.

The most significant judicial act of the Court of Appeals of New York State for present purposes probably was not the announcement of its decision but the issuance of its remittitur. That judicial act is similar to the "Order for Mandate" of the Second Circuit Court of Appeals. The significance of such an order for present purposes is discussed in *Comm'r* v. *Estate of Bedford*, 325 U. S. 283 (1945).

The remittitur in the present litigation was issued by the Court of Appeals on the same date that it announced its decision, which was July 15, 1952 (R. 171-172).

The finality of that judicial act of July 15, whether it inhered in the decision or the remittitur, became doubtful

when the Court of Appeals entertained an application for reargument. Such an application "tolls the running of the three months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties". *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942) 266. That uncertainty ended October 9 when the Court of Appeals denied reargument.

The State will argue on a subsequent page that Cardinal's application for amendment of the remittitur to provide for interest introduced another uncertainty into the "judgment" of July 15. Alternatively, suppose that it did not and hence October 9 is the date of the "final judgment". Ninety-three days thereafter, on January 10, 1953, the State's representative wrote the Clerk of this Court, asking how the State should present an application for extension of time within which to apply for a writ of certiorari. That form of relief was pursued diligently and Mr. Justice Jackson on January 19 signed an order extending time to March 9 "provided the time has not already expired".

We infer that there was a double or alternative uncertainty preserved for decision by all members of the Court. First, the time significance of the application to amend the remittitur was in doubt. If that question were to be decided according to the State's argument the State had until March 5 without any extension. Second, there was doubt whether the power to extend the time must be exercised within 90 days from the "final judgment" or could be at any time within the total of 150 days which Congress set as the ultimate limitation on a petition for certiorari. Mr. Justice Jackson's order of January 19 means, we suppose, that both questions are undetermined. Probably all we can contribute to decision is a clear understanding of the facts.

The State requests liberality in the decision of one branch or the other of its problem of timeliness, and sees nothing in 28 U. S. C. § 2101 subd. (c) which requires that the power to extend be exercised within the ninety-day or three-month period.

The motion to amend the remittitur which did not toll the running of the three-month period in *Dept. of Banking* v. *Pink* differed from the present one. The motion in the present case was not made by the Petitioner but by Cardinal. It affected the liability imposed upon the State to the amount of $19,571.56, the amount of interest eventually adjudged (R. 176). The application to amend the remittitur disclosed that the "judgment" of the Court of Appeals on July 15 or October 9 was uncertain or indefinite to the extent of the interest involved. At least until December 5, when the Court of Appeals said that the question of interest was for the Court of Claims in the first instance, the State could not know how great an obligation was placed upon it by the "judgment" of the Court of Appeals. There should be no decision that the State was required to elect whether to pay or appeal while the amount of its obligation was substantially uncertain.

We conclude our argument upon this question of timeliness by a reference to the judgment entered in the Court of Claims on December 22 (R. 174-176). The Petition says about this at page 8:

> "The judgment of December 22, 1952, was the first entry in any court of the indebtedness asserted in favor of Cardinal and against the State for the sum of $87,000 and interest having sufficient formality and precision and force to authorize its payment by the State. It was the first and only judgment for the principal sum in litigation which would support process for its collection against a defendant other than the State. It was the first and only judgment for that sum from which an appeal might have been taken consistently with the practice of the State courts."

We find no denial of any of those statements in the Respondent's Brief. Those are facts that should be understood. Even if they are irrelevant for purposes of this Court's practice as decided in 1942 and subsequently the State's predicament cannot be understood without understanding those facts.

We make no argument against the practice as decided in *Dept. of Banking* v. *Pink*. We submit that the State's application is timely if the specific facts controlling it are understood.

C

The argument of the Respondent's Brief under the heading that "no Federal statutes are involved in this litigation" appears to mean that the "immunity" claimed under section 905 of the Longshoremen's and Harbor Workers' Compensation Act was for the benefit of Cardinal and cannot be asserted by his insurer. Respondent cites no decision to that effect and we know of none.

Respondent's Brief, bottom of page 7, says that the State is aggrieved because Cardinal did not assert his defense under § 905. On the contrary the Petition, near the bottom of page 3, says that Cardinal pleaded the defense.

Judge Desmond was not discussing the State's defense of the present claim or any involvement of § 905 when he said that in 1946 and 1947 the Fund "waived all questions except as to the $25,000 alleged limit" (quoted in Respondent's Brief, middle of page 8). The claim was not filed until 1948 (R. 1, 8). The Petition, page 4, says truly that "in the present suit the State has * * * constantly relied on the immunity under 33 U. S. C. § 905". If its defense against the claim had not included that ground the opinions of all the Courts below could have omitted discussion of

American Mutual Liability Ins. Co. v. *Matthews* and many related citations.

D

The State has been held liable to Cardinal for the amount of his settlement with the United States and his expenses therein. This could not have been on the theory that Cardinal was liable to the United States by contract, because the insurance contract excludes such a liability. So it must have been, as stated in the dissenting opinion of Judge Dye (R. 168, quoted in the Petition, bottom of page 9), that Cardinal was liable to the United States under an obligation "imposed by law". As he said further:

> "Everyone agrees that unless there is a liability 'imposed by law' he may not recover, for the indemnity obligation assumed by contract is specifically excluded." (R. 168).

We find in the majority opinion no statement of the issue which is equally quotable to justify the State's two questions, but the opinion as a whole and all the opinions in the case justify them.

March 5, 1953.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN
Attorney General of the State
of New York
Attorney for the Petitioner

WENDELL P. BROWN
Solicitor General

HENRY S. MANLEY
Assistant Attorney General

Of Counsel